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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GAINEL MALYBAEVA, Plaintiff and Appellant, v. CHEVRON CORPORATION, Defendant and Respondent.	A136023 & A136631 (Contra Costa County Super. Ct. No. C10-02367)

Plaintiff Gainel Malybaeva filed an action against defendant Chevron Corporation for employment discrimination. The complaint alleges defendant subjected her to discrimination, harassment, and retaliation based on her race and national origin. She appeals a summary judgment in favor of defendant, contending the trial court erred in concluding defendant had legitimate, nondiscriminatory business reasons for terminating her employment. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Background

Plaintiff was born in Russia and grew up in the Republic of Kazakhstan—her parents are of Kazakh descent. She considers her national origin/ethnicity to be Russian/Kazakh and has, at times, understood her race to be Caucasian. However, she believes that others perceive her as Asian and, for purposes of this lawsuit, contends she is Asian.

Plaintiff's employment with defendant commenced in November 2004. She began working as an environmental advisor in defendant's Health Environment and Safety group in March 2007. Defendant terminated her employment in January 2010.

On July 20, 2010, plaintiff filed a complaint of discrimination with the Department of Fair Employment and Housing. She received a "right to sue notice."

II. The Complaint

On August 9, 2010, plaintiff filed a complaint against defendant alleging causes of action for: (1) discrimination; (2) tortious discharge in violation of public policy; (3) harassment and hostile work environment; (4) retaliation; and (5) failure to prevent the harassment, discrimination and retaliation.[1] In her complaint, she alleged that a coworker named Michelle Cox had made numerous negative comments pertaining to plaintiff's race and national origin. Cox also made disparaging remarks about other foreign-born employees, particularly with respect to their accents. In the summer of 2008, plaintiff submitted a complaint regarding Cox's action to her then-supervisor Janet Peargin, and to defendant's human resources department.

In January 2009, plaintiff was assigned a new supervisor, Graham Edwards. Edwards began increasing plaintiff's workload and implied she would be fired if she did not complete her additional tasks.

In March 2009, plaintiff complained again to defendant's human resource representative regarding ongoing harassment by Cox, as well as treatment to which she was being subjected to by Edwards.

Prior to August 2009, Edwards began pressuring plaintiff to apply for a job at a different Chevron location. He subsequently posted a job announcement for her existing position. He later told her the posting was a mistake, but continued to pressure her to apply for a transfer. She told him that she did not want to change jobs. She believed he

[1] Plaintiff also pled claims for disability discrimination, and violation of the Family Medical Leave Act and the California Family Rights Act. These claims have been abandoned on appeal.

was retaliating against her because of his close relationship to Cox, as well as in response to her complaints to human resources.

In September or October 2009, plaintiff began being treated by a health care provider for high blood pressure and was placed on medication. On October 29, 2009, Edwards changed her work hours, and later increased her schedule from nine to nine and a half hours a day.

Plaintiff's semiannual performance management plan (PMP) meeting was scheduled for December 3, 2009. Plaintiff called in sick that day, and Edwards rescheduled the meeting for December 11, 2009. Plaintiff had already been approved to take that day as a vacation day, which she needed to use for family medical appointments. Edwards told her she needed to apply for family medical leave to be excused from work, or her absence would be considered insubordination.

On January 14, 2010, plaintiff informed the human resources department that she was in the process of applying for a few weeks of family medical leave. That same day, she had her PMP meeting with Edwards and a member of the human resources department. As part of the PMP process, she completed a managerial feedback section, in which she criticized Edwards for his hostile behavior and for failing to followup on her complaints regarding Cox.

On January 21, 2010, plaintiff was terminated from her employment "for purportedly having an 'inappropriate response to the 2009 PMP form and her inability to adhere to the process.' "

III. Motion for Summary Judgment

On January 27, 2012, defendant filed a motion for summary judgment.

On May 8, 2012, the trial court filed its order granting the summary judgment motion as to all causes of action. It found defendant had shown a legitimate, nondiscriminatory reason for plaintiff's termination. Based on this finding, defendant was entitled to summary judgment as to plaintiff's causes of action for discrimination, retaliation, and wrongful termination in violation of public policy. Her claims for harassment and hostile work environment also failed because the purported harassment

based on her race or national origin was not sufficiently pervasive or severe to warrant the imposition of liability. Additionally, her claim for failure to prevent discrimination, harassment, and retaliation failed because there was no merit to her discrimination, harassment and retaliation causes of action. This appeal followed.

DISCUSSION

I. Summary Judgment and Standard of Review

A motion for summary judgment requires the court to determine whether the entire action lacks merit. (Code Civ. Proc. § 437c, subd. (a).) The burdens of the parties to such a motion are as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850–851, fns. omitted.)

We review the trial court's ruling on a motion for summary judgment de novo, viewing the evidence in the light most favorable to the opposing party. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499.) We consider all of the evidence offered by the parties in connection with the motion, except that which the court properly excluded. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. Defendant's Showing

In seeking summary judgment, defendant presented evidence supporting the following version of the underlying facts: Defendant's human resources department

conducted an investigation of plaintiff's complaints about Cox in 2008, and concluded the discriminatory allegations against Cox could not be substantiated. Instead, the conflict between the two women "related to work styles and communication, not to any protected characteristic." Plaintiff's office was relocated in order to limit her interactions with Cox. When plaintiff complained about Cox again in 2009, defendant conducted another investigation and concluded that Cox had not made any comments to plaintiff that were racial in nature.

Defendant also investigated plaintiff's claims that Peargin gave preferential treatment to Cox because of her race, and that Peargin had attributed plaintiff's "direct" and "rude" communication style to her national origin. Plaintiff's allegations were determined to be unsubstantiated. It is undisputed that Peargin was not involved in the decision to terminate plaintiff's employment.

With respect to plaintiff's complaints that Edwards had taken detrimental actions against her based on her race, defendant offered evidence to show that Edwards was unaware of her specific race and national origin. Edwards stated in his deposition that he was aware plaintiff had a "vague accent," but denied having any knowledge that she was Asian, or that she was from Russia. Plaintiff herself testified in her deposition that she had previously considered herself to be Caucasian, not Asian. Defendant investigated her claims of bias against Edwards and concluded his actions toward her were business related and appropriate.

Defendant also sought to establish that the PMP process is "based on goal-setting," and "is not an opportunity for an employee to review his/her supervisor's performance." Employees are required to submit their PMP forms—discussing their performance and accomplishments—to their supervisors by established deadlines. Compliance with the PMP process is mandatory. Plaintiff was aware that Edwards had authority to schedule her review meeting and to request that the PMP form be completed by a particular date. She failed to submit her completed form in advance of a meeting scheduled for December 3, 2009. She took a sick day and failed to meet with him. She

also failed to meet with him when he rescheduled the meeting for December 11, 2009. Defendant denied she had previously been approved to take that day off.

Plaintiff finally submitted her completed PMP form on January 11, 2010. Prior to this time, she was warned that further insubordination would result in disciplinary action up to and including termination. She was terminated after she deviated from the PMP process and used a "substantial portion" of her PMP to describe her personal criticisms of Edwards' performance. According to Edwards, the relevant portion of the PMP is to be used to make a comment about the supervisor's appraisal of the employee's performance, not to express their opinions about the supervisor. Rather than follow protocol, plaintiff had used the PMP to make sarcastic and inappropriate remarks about Edwards. In Edwards' view, plaintiff "took this as an opportunity to provide personal criticism of me, and thereby to reduce the credibility of my assessment of her performance." She was made aware of this problem, and was given the opportunity to remove those comments and resubmit the PMP form, but she did not. Plaintiff was ultimately advised as follows: "[Y]ou were counseled on insubordination. Instead of expressing regret or a commitment to improve, you responded with further insubordinate behaviors on an issue as basic as participating in the PMP process. Given this repeated, insubordinate behavior . . . we are unable to further continue our at-will relationship."

Defendant argued below that the evidence supports it had legitimate business reasons for terminating plaintiff's employment. Defendant further alleged that the alleged discriminatory conduct plaintiff had complained of was either immaterial or insufficiently pervasive to support her claims.

III. Plaintiff's Showing and Trial Court's Rulings

In opposition to the summary judgment motion, plaintiff attempted to dispute many of the facts relied on by defendant. For example, plaintiff claimed Peargin had stated that the reason plaintiff came across in her e-mails as rude is *because* she is Russian. Peargin had also made statements about the challenges posed to Cox in progressing in her field as an African-American woman, giving plaintiff the impression that Peargin accorded Cox preferential treatment due to Cox's race. She also documented

repeated instances in which Cox directed allegedly harassing conduct toward plaintiff, including asking her to repeat phrases, making unpleasant faces when listening to plaintiff's accent, stating that she used "poor English," yelling at her, and stating that her computer skills were substandard. Cox had also mocked other employees whose native language was not English. Plaintiff asserted that Edwards had harassed her by changing her work hours, yelling at her, posting her position as being available, and increasing her workload.

In support of her discrimination claim, she submitted a declaration from Julie Lee, a coworker of Korean descent. The trial court sustained defendant's evidentiary objections to most of this declaration. The allowed statements all concerned Cox's harassing conduct, including her tendency to "treat coworkers who were born in other countries differently by making negative remarks when they mispronounce words." Lee also related incidents in which Cox sought to undermine Lee's and plaintiff's work performance by badmouthing them and making sarcastic jokes. As noted above, the court found in favor of defendant.

IV. Analysis

A. Discrimination

In cases of intentional discrimination based on circumstantial evidence, California follows the burden-shifting test established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) At trial, the employee bears the initial burden to establish a prima facie case of discrimination by showing that: "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.) The burden then shifts to the employer to produce admissible evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Id.* at pp. 355–356.) If that is done, the employee must then show that the employer's proffered reason is a pretext for discrimination. (*Id*. at p. 356.)

Pretext may be shown either directly with evidence " ' " '[t]hat a discriminatory reason more likely motivated the employer' " ' " or indirectly with evidence that " ' " '[t]he employer's proffered explanation is unworthy of credence.' " ' " (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68 (*Morgan*).) It is insufficient to " '[s]how the employer's decision was wrong, mistaken, or unwise.' " (*Id.* at p. 75.) The employer's proffered legitimate reasons must be so weak, implausible, inconsistent, incoherent, or contradictory " ' " ' "that a reasonable factfinder *could* rationally find them 'unworthy of credence,' . . ." ' " ' " in order to infer that the employer's decision was not based on them. (*Ibid*.)

An employer satisfies its burden on summary judgment by producing admissible evidence showing the employee cannot establish a prima facie case. (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 216 (*Addy*).) Alternatively, if the employer's motion is based on a showing of its nondiscriminatory reasons for the challenged action, the employer satisfies its burden by producing evidence of such nondiscriminatory reasons, and the employee must then produce evidence raising a triable issue of material fact that intentional discrimination occurred. (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098, citing *Guz, supra*, 24 Cal.4th at p. 357.) Circumstantial evidence that the employer's reason was untrue or pretextual must be "specific" and "substantial," not speculative. (*Morgan, supra,* 88 Cal.App.4th at p. 69; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807; see also *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389–390 (*McRae*) [employee's theory, speculation or personal belief unsupported by competent evidence is not substantial evidence of pretext].)

"Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that intentional discrimination, on grounds prohibited by the statute, was the true cause of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to

summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra,* 24 Cal.4th at p. 361, italics & fn. omitted.)

Here, to establish that defendant had a legitimate, nondiscriminatory basis for its conduct, defendant relied primarily on Edwards' deposition and declaration, supplemented by declarations from employees in defendant's human resources department. Edwards maintained that his conduct toward plaintiff was directed solely at deficiencies in her professional performance. Moreover, he and the other employees asserted no one had fabricated complaints about plaintiff, yelled at her, or directed derogatory comments at her regarding her national origin or perceived race.[2] The declarations reveal that plaintiff's complaints about Cox's and Edwards' allegedly racist behavior were dutifully investigated and found to lack merit. They also document plaintiff's failure to comply with the PMP process and her resulting dismissal.

In view of this showing, the trial court concluded defendant had tendered legitimate nondiscriminatory reasons for its conduct regarding plaintiff. We agree. As our Supreme Court has explained, " 'legitimate' reasons [citation] in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination. [Citations.]" (*Guz, supra,* 24 Cal.4th at p. 358, italics omitted.) Thus, if an employer's reasons for its conduct are not discriminatory, they "need not necessarily have been wise or correct. [Citation.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with a motive to discriminate illegally." (*Ibid.*) Because the reasons offered for the actions of plaintiff's superiors were not discriminatory, they constitute a facially proper basis for those actions. (*Ibid.*) We have

[2] Indeed, plaintiff herself admitted in her deposition that no one in her department had ever made any derogatory comments to her about her race, ethnicity, or national origin.

no difficulty in concluding that repeated acts of noncooperation and insubordination constitute justification for terminating an employee.

The burden on summary judgment thus shifted to plaintiff to demonstrate that the "actual motive [of defendant's employees] was discriminatory." (*Guz, supra,* 24 Cal.4th at p. 361.) To carry this burden, plaintiff could not rely on the allegations in the complaint, insofar as defendant's showing disputed them. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162; *Conn v. National Can Corp*. (1981) 124 Cal.App.3d 630, 639.) Rather, she was required to offer "substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005.) For this reason, plaintiff could not merely question the proferred reasons, as " '[a] reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false, and that discrimination was the real reason.' " (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003, italics omitted, quoting *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 515.)

In view of the record before us, we agree with the trial court that plaintiff failed to carry her burden. Although Peargin, at least in part, attributed plaintiff's blunt communication style to the fact that she is from Russia, the record is otherwise devoid of any references to plaintiff's national origin.[3] Moreover, there was evidence plaintiff initially explained her behavior to Peargin by *conceding* that Russian people have a very direct communication style.

The bulk of plaintiff's complaints regarding the allegedly discriminatory work environment are directed at Cox, who was plaintiff's peer. Cox never supervised plaintiff, never gave her work assignments, and had no involvement with the terms or

[3] Peargin also counseled plaintiff that her tone was offensive and that Peargin "had witnessed [plaintiff] being quite 'commanding' with other team members" aside from Cox.

conditions of her employment. When plaintiff complained about Cox's behavior, Peargin and others responded appropriately by investigating the matter, creating physical distance between their workspaces, and counseling them on how to interact productively. Their conflict was investigated by defendant's human resources department, and was determined to be related to communication and work style, not to race or national origin. As to her stated belief that she incurred discriminatory treatment due to being perceived as an Asian, there is no evidence that anyone in the workplace perceived her as such or that she was discriminated against based on her apparent Asian origins. For example, Edwards testified in his deposition that he never thought plaintiff was Asian, and that even if she was it would have made no difference to him.

To the extent plaintiff relies on Lee's declaration to establish anti-Asian bias, we note the trial court sustained the bulk of defendant's evidentiary objections. We find no basis to overturn the court's ruling. (See *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444 [trial court's evidentiary rulings in the context of a summary judgment motion are reviewed for abuse of discretion].) Regardless, Lee's declaration does not support plaintiff's claim of racial bias. For example, Lee states her "impression" was that Edwards "retaliated against [plaintiff] for expressing [her] dissatisfaction with having to take on Cox's job duties." Prior to this time, Peargin had done her best "to control Cox's behavior and refused to allow Cox to pass on any more duties to [plaintiff]." Not only is this weak evidence, in that it is based solely on Lee's subjective "impression," there is no mention of an anti-Asian bias.

Lee also chronicles Cox's unfortunate habit of ridiculing the accents and English language skills of persons not born in the United States. However, it is undisputed that Cox was not plaintiff's supervisor. While Lee states that Edwards was present when Cox ridiculed the accent of an employee who was from the Netherlands, there is no evidence that Edwards was present when Cox made similarly rude statements directed at Asians, beyond her unsubstantiated belief that he had witnessed Cox harassing another Asian coworker. Lee also states that Edwards called her (Lee) his "slave." It is unclear how this fact relates to plaintiff's claims, as there is no evidence he referred to plaintiff as his

"slave." Nor does plaintiff explain how the use of this term evidences an anti-Asian bias. Thus, even assuming the proffered evidence is admissible, and construing the evidence in favor of plaintiff, it does not support a claim of discriminatory bias as to plaintiff's national origin or race.[4] At best, it supports the existence of a socially-dysfunctional workplace.

Plaintiff's complaints regarding Edwards were also investigated by defendant's human resources department and determined to be lacking in merit. She does not offer any evidence to suggest Edwards' conduct towards her was influenced by antipathy regarding her race or nationality. Thus, plaintiff has failed to establish any pretextual motive. Regardless of her protests as to the unfairness of the specific events surrounding her termination (such as her claim that other employees were allowed to reschedule their PMP meetings without adverse consequences), she cannot demonstrate that these events were engendered, even in part, by a discriminatory bias against her.

B. Other FEHA Claims

As the trial court found, plaintiff's claims for harassment and retaliation fail for similar reasons. To begin, FEHA's prohibition against harassment bars " 'discriminatory intimidation, ridicule[,] and insult' " based on an employee's national origin that is " ' " 'sufficiently severe or persuasive to alter the conditions of the victim's employment and create an abusive working environment.' " ' " (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951, quoting *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 409.) (See Gov. Code, § 12940.) To prevail on such claims, employees must show that the workplace conduct that they confronted qualified as hostile or abusive to employees "because of" their national origin. (See *Miller v. Department of Corrections*

[4] Plaintiff overstates her case in asserting that the FEHA "must be viewed in light of judicial repudiation of ethnocentric discrimination, whether or not it targets just one particular nationality." In her complaint, she does not plead a cause of action for "ethnocentric discrimination." Instead, her claims allege discrimination "due to *her* race/color and national origin/ancestry." (Italics added.) (See *Hatai v. Department of Transportation* (2013) 214 Cal.App.4th 1287, 1296 [trial court acted well within the bounds of its discretion in excluding evidence relating to employees outside the plaintiff's protected class].)

(2005) 36 Cal.4th 446, 462 (*Miller*).) Here, plaintiff's claim that defendant created such a workplace relies on the factual allegations in the complaint supporting her claim for discrimination. As explained above, defendant shifted the burden to plaintiff to raise a triable issue whether she encountered misconduct based on a discriminatory motive, which she did not do. At best, plaintiff has raised the inference that her coworker Cox was disrespectful of employees who are not native English speakers. This conduct, while unfortunate, is not actionable, both because Cox had no control over plaintiff's conditions of employment, and because the conduct itself does not appear to have been directed toward any specific race or nationality.[5]

We reach the same conclusion regarding plaintiff's claim for retaliation, which also relies on the factual allegations underlying her other FEHA claims. Under FEHA, retaliation claims, like discrimination claims, are subject to the "three-stage burden-shifting test." (*Guz, supra,* 24 Cal.4th at p. 354.) "The elements of . . . [FEHA] claims require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [conduct]. [Citations.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) To establish a prima facie case of retaliation, employees may show that "(1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller, supra,* 36 Cal.4th at p. 472.)

Here, plaintiff's retaliation claim alleges that after she filed complaints with defendant regarding Cox and Edwards, she was subjected to oppressive working conditions, hostility, and unfair treatment. As with plaintiff's discrimination claim,

[5] We note that Edwards was born in Great Britain, thus plaintiff's assertion that he condoned the "harassment of foreign-born employees" is somewhat suspect.

defendant offered a showing of legitimate nonretaliatory reasons for its conduct.[6] As noted above, Edwards testified that his conduct toward plaintiff was based on concerns regarding her professional conduct. We see no evidence in the record raising the reasonable inference that despite his proffered reasons, Edwards' conduct was, in fact, retaliatory. In sum, plaintiff's harassment and retaliation claims fail for want of a triable issue of fact.[7]

DISPOSITION

The judgment is affirmed.

_____
Dondero, J.

We concur:

_____
Margulies, Acting P.J.

_____
Becton, J.*

[6] In view of this showing by respondents, we do not address whether plaintiff established a prima facie case of retaliation. (See *Guz, supra,* 24 Cal.4th at p. 357.)

[7] Plaintiff makes no argument and presents no legal authorities regarding her Family Medical Leave Act and California Family Rights Act claims. Accordingly, we deem that any claim of error as to the trial court's ruling on her claims has been waived.